Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1542

In the
Supreme Court of the United States

OCTOBER TERM, 1996

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
Petitioner

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
Respondents

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

WILLIAM W. CHIP
Counsel of Record
Counsel for Petitioner
Suite 500
555 12th Street, N.W.
Washington, D.C. 20004
(202) 879-4934

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

REPLY 1

1. The Petition Should be Granted Because it Presents the Same Issue as *NCUA v. First National Bank*. 1

2. FAIR Challenges Respondents' Own Unlawful Acts, not their Nonenforcement of the Law 2

3. FAIR Challenges a Breach of Statutory Limits on Discretion, not the Exercise of Discretion itself 3

4. FAIR Sufficiently Alleged Article III Standing 4

5. The INA's Restrictions on Parole Were Intended to Prevent Evasion of the INA's Immigration Limits 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). 3

Clarke v. Securities Industry Association, 479 U.S. 388 (1987). 1,2

Hazardous Waste Treatment Council v. EPA, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989). 2

Heckler v. Chaney, 470 U.S. 821 (1985) 2,3

Jean v. Nelson, 472 U.S. 846 (1985) 3

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). 4

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).. 4

National Credit Union Administration v. First National Bank & Trust Co., No. 96-843 1,2

Statutes:

8 U.S.C. § 1158(a)(3) 4
8 U.S.C. § 1158(b)(3) 4
8 U.S.C. § 1160(e)(3) 4
8 U.S.C. § 1182(a)(5)(C)(iii) 4
8 U.S.C. § 1229c(f) 4
8 U.S.C. § 1254a(b)(5)(A) 4
8 U.S.C. § 1255a(f)(4)(A). 4

REPLY BRIEF FOR PETITIONER

1. The Petition Should be Granted Because it Presents the Same Issue as NCUA v. First National Bank.

On February 24 this Court granted a writ of certiorari to the District of Columbia Circuit in *National Credit Union Administration [NCUA] v. First National Bank & Trust Co., No. 96-843,* to review the same issue that is presented in FAIR's petition--whether the Circuit's "suitable challenger" test for APA standing is consistent with the APA standing test in *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388 (1987). In *NCUA* the plaintiffs were held to be "suitable challengers" of statutory violations by a federal agency and were allowed standing; in FAIR's case the court below decided that FAIR was not a "suitable challenger" of Respondents' actions and denied standing.

Respondents urge that FAIR's petition be denied even though it presents the same issue as *NCUA*, arguing that the District of Columbia Circuit is likely to deny FAIR's standing whether or not this Court rejects the "suitable challenger" test when it decides *NCUA*. (Opp. at 23-24) Respondents' argument erroneously assumes that the "suitable challenger" test is a less restrictive standing test than the *Clarke* test so that any plaintiff that has failed the "suitable challenger" test must also fail the *Clarke* test. In fact the "suitable challenger" test is neither more nor less restrictive than the *Clarke* test. It is a wholly different test that may sometimes permit standing to plaintiffs that fail the *Clarke* test and may sometimes deny standing to plaintiffs that pass the *Clarke* test.

Clarke held that congressional intent to permit APA review of alleged statutory violations was presumed "unless the plaintiff's interests are so marginally related to or

inconsistent with the purposes implicit in the statute" that the assumption of reviewability would be unreasonable. *Clarke*, 479 U.S. at 399. In a series of cases beginning with *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989), the District of Columbia Circuit has given increasingly less weight to the relationship between the plaintiffs' interests and the statutes' purposes than to the plaintiffs' perceived "suitability" as "litigative champions" of the public interest. Thus, FAIR was found to be an "unsuitable" challenger, not entitled to standing, even assuming that the interest of FAIR members in preventing immigration-related injuries fell within the statute's zone of interests. (Pet. at 7a-8a) In *NCUA* the bank plaintiffs were found to be "suitable" challengers of credit union statute violations, entitled to standing, even though the banks' interests were, according to the government, unrelated to those protected by the statute. *NCUA*, Pet. 9-10.

This Court's review of the District of Columbia Circuit's "suitable challenger" test would be incomplete if it did not take into account how the test has been used to deny standing as well as to allow it.

2. FAIR Challenges Respondents' Own Unlawful Acts, not their Nonenforcement of the Law.

Citing *Heckler v. Chaney*, 470 U.S. 821 (1985), Respondents argue that FAIR's petition should be denied because FAIR's complaint seeks enforcement of the Immigration and Nationality Act ("INA") against third parties. (Opp. 10) That is not correct. FAIR's suit demands, not that Respondents prosecute immigration lawbreakers, but that Respondents not break the law themselves by paroling or accepting inadmissable

immigrants, by issuing them work authorization and entry documentation, and by adjusting them to lawful permanent resident status. (Pet. 63a-67a) The APA's rebuttable presumption that an agency's decision not to enforce a statute is nonreviewable "did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers". *Heckler v. Chaney,* 470 U.S. at 833.

3. FAIR Challenges a Breach of Statutory Limits on Discretion, not the Exercise of Discretion itself.

Respondents assert that FAIR's claims are unreviewable under the APA because the parole authority is committed to Respondent Reno's "complete discretion". (Opp. 10-12, 24) In fact, federal courts, including this Court, have treated exercises of the parole authority as reviewable under the APA. *E.g, Jean v. Nelson,* 472 U.S. 846 (1985). Moreover, FAIR's complaint addresses a breach of the statutory limits that constrain Respondent Reno's parole authority, not how she chooses to exercise her discretion within those limits. (Pet. 16a-17a) Finally, while parole itself is discretionary, several of the other challenged actions are clearly *not* within Respondents' discretion, such as the issuance of documents allowing inadmissable immigrants to "enter and remain in the United States permanently". (Pet. 64a-67a)

The specification of judicial review procedures in a few INA provisions does not, as Respondents assert (Opp. 11-12), foreclose by implication review of unrelated provisions like those at issue in FAIR's complaint. "[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967) (quoting

L. Jaffe, Judicial Control of Administrative Action 357 (1965)). Moreover, a number of INA provisions contain *restrictions* on judicial review, which Congress would not have troubled itself to impose if the statute were generally nonreviewable. *E.g.*, 8 U.S.C. §§ 1158(a)(3), 1158(b)(3), 1160(e)(3), 1182(a)(5)(C)(iii), 1229c(f), 1254a(b)(5)(A), 1255a(f)(4)(A).

4. FAIR Sufficiently Alleged Article III Standing.

Respondents urge denial of FAIR's petition based on the district court's holding that FAIR lacks Article III standing. (Opp. at 12-15, 24) Although the majority opinion in the court of appeals based its affirmance solely on prudential standing and did not address Article III standing, the dissenting opinion includes a thorough refutation of the district court's reasoning. (Pet. 20a-24a)

Respondents contend that FAIR's complaint has not alleged enough facts to establish Article III standing. (Opp. 14-15) That contention is belied by the complaint itself. (Pet. 53a-54a, 57a-60a) Moreover, on a motion to dismiss it is presumed "that general allegations embrace those specific facts that are necessary to support the claim". *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

5. The INA's Restrictions on Parole Were Intended to Prevent Evasion of the INA's Immigration Limits.

Because the majority below acknowledged that the INA's immigration limits were intended to protect the employment of U.S. residents, they would have recognized FAIR's prudential standing but for their conclusion that the immigration limits had no "integral relationship" with the parole authority. (Pet. 11a-13a) Inexplicably, the majority's

determination takes no account of the 1952 legislative history cited in the dissenting opinion (Pet. 16a-17a), nor of the 1965 and 1996 legislative history cited in FAIR's petition (Pet. 13-14), all of which unambiguously declare that the INA's restrictions on parole were intended to prevent the use of parole to evade the INA's immigration limits.

Respondents state that the 1996 legislative history is irrelevant because it describes unenacted legislation. (Opp. 18 n.3) That statement is inaccurate. While some provisions of the original 1996 bill were not enacted into law, Congress *did* enact the requirement that parole be exercised on a "case-by-case" basis, the very provision described in the committee report as reinforcing longstanding restrictions against using parole to admit immigrants outside the INA's limits. (Pet. 7)

CONCLUSION

For the reasons set forth in the petition and herein, the writ of certiorari should be allowed.

Respectfully submitted,

WILLIAM W. CHIP
Counsel of Record
Counsel for Petitioners
Suite 500
555 12th Street, N.W.
Washington, D.C. 20004
(202) 879-4934